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No. 94-1803

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Supreme Court of the United States

OCTOBER TERM, 1994

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, and BERNARD J. ANING, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

JOHN MORRELL & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

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1. Whatever its intended purpose, respondent's central argument for denying the *certiorari* petition *confirms*—rather than refutes—the petition's central argument for granting *certiorari*.

The heart of respondent's brief in opposition (at pp. 9-18) is a lucid outline of *an* approach—the approach of the Eighth (and Fifth) Circuits—to determining the legal significance of a collectively-bargained promise to provide health insurance to employees who retire during the term of the agreement. The proper course for a court to take in such a case, says respondent, is to "acknowledge the existence of an asserted § 301 claim, while looking to ERISA [the Employee Retirement Income Security Act,

29 U.S.C. §§ 1001 *et seq.*] and its federal body of law to ultimately resolve these disputes." Resp. Br. at 12. Doing so, one finds that ERISA does not, as a matter of law, mandate the vesting of retiree health insurance or other welfare benefits. Thus, "judicial intervention to infer a vested right in a welfare plan is particularly inappropriate." Resp. Br. at 17. From this respondent concludes that "look[ing] to § 301 to . . . open the way for more advantageous 'interpretative rules' to govern suits over collectively-bargained retiree health benefits" is an " 'end run' around the statute [ERISA]." Resp. Br. at 17-18.

But respondent's difficulty—and the law's—is that no matter how logical all this may appear to some, the Sixth (and Fourth) Circuits start from *different* legal premises that lead to a *different* legal conclusion. And, the Seventh Circuit starts from still different premises and reaches a third different conclusion.

Under the Sixth Circuit analysis, Congress' decision not to *mandate* vesting of welfare benefits by statute does not throw a cross light on the proper interpretation of collectively bargained promises to provide for retiree health coverage. Contracting systems are not about copying the rights and obligations already settled by public law, but about the negotiation of private agreements on matters *not* settled by public law.

The Sixth Circuit regards two labor law points as telling: first, retiree benefits "are typically understood as a form of delayed compensation or reward for past services;" and, second, since "[b]enefits for retirees are only permissive not mandatory subjects of collective bargaining" under the National Labor Relations Act, unions can only guarantee that employees receive such deferred compensation after retirement by creating accrued or vested rights. *Autoworkers v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007.

This analysis, rooted in the labor law rather than in ERISA, "demonstrates," in the Sixth Circuit words, "the likelihood that continuing insurance benefits for retirees were intended." *Id.*[1]

Because the two approaches just outlined have almost nothing to do with each other, after putting on a brave show, respondent is reduced to name calling: the "labor law argument," we are told, is "a huge red herring." Resp. Br. at 8. But the salient point at this jurisdictional stage of this case is that the Sixth (and Fourth) Circuit's herring is a fish of a different kind and color than the one swimming through the Eighth (and Fifth) Circuits—and both are different than the Seventh Circuit fish—and that the resulting conflict in the circuits is, indeed, "huge."

2. Remarkably, after nine pages extolling the Eighth Circuit's ERISA-based theory and disparaging the Sixth Circuit's competing, labor law-based theory, respondent turns around 180 degrees and denies that there are competing legal theories that govern § 301 retiree health insurance cases. The higher principle that harmonizes the dissonance, according to respondent, is that "all of the circuits uniformly rely on traditional contract principles to resolve these disputes." Resp. Br. at 18. All the circuits, in other words, begin from the unexceptional premise that in these § 301 actions, as in all others, the parties' intent is determinative, and that their intent is to be discerned through the text of the agreement, the bargaining history and the like. See Resp. Br. 18-20. If appellate court agreement at that level of abstraction were all the legal uniformity that § 301 guarantees, that guarantee would be hollow indeed.

Respondent's soothing assurance simply ignores the point Judge Easterbrook made in the Seventh Circuit's

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[1] As we developed in the *certiorari* petition (at pp. 16-17), the Seventh Circuit has developed a third interpretive approach to § 301 retiree health insurance provisions.

retiree health insurance case—"law provides the background against which the parties' words carry meaning." *Bidlack v. Wheelabrator Corp.*, 993 F.2d 604, 620 (7th Cir. 1993 (dissenting opinion), *cert. denied*, 114 S.Ct. 291. And, as we show in our petition—a showing respondent's brief (at pp. 9-18) *confirms*—the appellate courts' differing understandings of the applicable, background law has led them to announce conflicting interpretive rules as to the meaning of collectively-bargained promises of retiree health insurance.

In the Sixth Circuit, "normally retiree health benefits are vested," *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d at 672. In the Eighth Circuit it "seems illogical to infer an intent to vest," *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988). *And, see Bidlack v. Wheelabrator Corp., supra,* for the Seventh Circuit's "intermediate" interpretative rule. That is plainly the kind of circuit conflict that generates confusion and unsettled legal rights and that this Court sits to resolve.

3. Respondent would downplay the significance of these conflicting interpretive rules by offering the following evidence of uniformity: the Sixth Circuit has ruled "for the employer in the two most recent retiree health benefit cases before it" whereas in the "Eighth Circuit's most recent case addressing retiree health benefits the Court of Appeals . . . found in favor of retirees." Resp. Br. at 23 (emphasis omitted). Respondents misstate the cited cases and their significance.

One of the two Sixth Circuit cases respondent cites had nothing whatsoever to do with retiree health benefits.[2] The other—an unpublished, *per curiam* opinion not

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[2] *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994), did not involve retiree benefits at all but involved instead *severance pay* (denaminated a "special distribution benefit"). The plaintiffs there claimed that their right to such pay vested upon the closing of the plant so as to foreclose the union and the employer from negotiating a plant closing agreement which superseded the preexisting

even citable within the Sixth Circuit—involved a change in retiree health benefits which that court sustained on the ground that "the collective bargaining agreement '*unambiguously* allows the Defendant to change the retirees' benefits to the same extent that the Defendant changes the benefits for the active employees.' "[3] The area of contention here, as we noted in our petition, is "generated by contract language that is less than crystal clear." Pet. at 10. The great preponderance of litigated § 301 cases arise in that area, not in the area, occupied by *Aldridge*, in which the contractual provision is unambiguously clear.

Thus, neither of the cases cited by respondent detracts from our showing that "in the Sixth Circuit the *Yard-Man* inference almost always carries the day and collectively-bargained promises of retiree benefits are consistently interpreted to create accrued or vested rights." Pet. at 17.

Conversely, the Eighth Circuit case on which respondent relies did not even involve a collectively bargained retiree health insurance provision.[4] That case does not so

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collective bargaining agreement and which provided a variety of benefits (including continuation of retiree health insurance) in lieu of severance pay. The court of appeals held, however, that even under the preexisting contract the plaintiffs were not entitled to severance pay because that contract provided such pay only for persons not "eligible for a pension under any pension plan" and the *Adcox* plaintiffs *were* eligible for a deferred pension.

[3] The collective bargaining agreement in *Aldridge v. Mosler*, C.A. No. 93-3061 (6th Cir., Feb. 14, 1995) expressly stated that should "the group health care program for active employees change, the program for retirees will change accordingly." Thus, the Sixth Circuit's conclusion that the agreement "unambiguously" permitted the changes at issue in that case was hardly surprising.

[4] The sole question in *Jensen v. Sipco, Inc.*, 38 F.2d 945 (8th Cir. 1994), *cert. denied*, 131 L.Ed. 310 (1995), was whether the reservation of rights clause in the employer's unilaterally-created health plan sufficed to prevent retiree benefits from vesting; the court answered that question in the negative.

much as implicate, much less consider, the conflicting ERISA-based/labor law-based interpretative rules that apply to collectively-bargained retiree health insurance provisions depending on the litigation forum. And, that case most certainly does not detract from our showing that in the Eighth Circuit collectively-bargained promises of retiree health insurance do not survive the termination of the agreement. *See* Pet. at 14-15.

3. Just one year ago, in a less adversarial setting, respondent's lead counsel in the instant case observed that whereas the Sixth Circuit "has adopted a pro-employer stance in the nonunion setting," in retiree health insurance cases that circuit "takes a noticeably different approach when dealing with the termination or modification of benefits provided pursuant to a collective bargaining agreement." Boies & Ross, *The Struggle Over Retiree Medical Benefits: Who's on Top?*, 19 Emp. Rel. L. J. 169, 177-78, 181 (1993). Respondent's counsel contrasted the Sixth Circuit law with the Eighth Circuit law which "has repeatedly recognized the employer's right to modify or terminate retiree medical benefits in both the nonunion and union setting." *Id.* And, respondent's counsel concluded that article with advice to employers as to how to go about modifying or terminating retiree health insurance, including the following:

> The likelihood of litigation in this area thus suggests another useful tool—the chance to conduct the litigation in an advantageous forum. *The outcome of a retiree benefit case may largely depend on the different presumptions, burdens of proof, and evidence entertained by the courts.* Employers astutely aware that litigation is likely to ensue as a result of plan modifications or termination may be wise to seek a declaratory judgment of their right to make such changes in an appropriate jurisdiction before affected retirees or their union files a law suit. With proper plan language *and the application of a favorable legal analysis*, employers are likely to achieve

court approval in modifying retiree health care benefits. [*Id.* at 185 (emphasis added).] [5]

This is precisely the situation § 301 was enacted to avoid. We submit that the time has come for this Court to determine the appropriate § 301 rule governing the interpretation of collectively-bargained promises of retiree health insurance.

CONCLUSION

For the reasons stated in the *certiorari* petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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[5] Contrast the statement in text with respondent's claim in its brief:

> Petitioners' strenuous arguments about a supposed three-way conflict among the circuits as to how to interpret these contracts reads well until compared with what the court of appeals are actually doing. All of the circuits use a federal common law of contracts analysis for deciding benefits cases; none use presumptions, none shift the burden of proof. [Resp. Br. at 8]